Piraeus Bank AE v Antares Underwriting Ltd and Others [2022] EWHC 1169 (Comm); [2022] 2 Lloyd's Rep 1

Mortgagees' interest insurance policies

In this case, the question arose "whether the prolonged detention of a vessel in Venezuela gave rise to a constructive total loss of that vessel under the owners' war risks policy". If a constructive total loss was at hand under that policy, could the mortgaging bank under a mortgagees' interest policy recover an indemnity in respect of its loss as assignee and also as loss payee under the owners' war risks policy?

The claimant, Piraeus, was a Greek bank and the mortgagee of the vessel *ZouZou*. It had insured its interest under a mortgagees' interest insurance policy (the "MIIP") on industry standard terms. The 13 defendants were underwriters – mostly Lloyd's syndicates – on that policy. The MIIP was broadly designed to cover any shortfalls in indemnity for the bank under the shipowners' own war risks policy. Relevant shortfalls were a wide range of named circumstances which may here be exemplified by owners' non-disclosure, cancellation of class and scuttling. Pursuant to the MIIP, the insurers agreed to insure the bank to cover all vessels mortgaged to and declared by the bank from 1 July 2014 to 30 June 2015. Declaration in respect of *ZouZou* had been made on 23 January 2015. The mortgages at issue were a first and second preferred mortgage, both dated 27 December 2013. According to its clause 1, the MIIP was to cover loss, damage or liability arising out of six types of loss numbered (i) to (vi), each described in extensive language (at para 16 of the judgment).

The war risks policy for which the MIIP thus provided a backstop was between shipowners and Hellenic Mutual War Risks Association (the Club). The owners and the Club were not parties to this litigation, as the owners had assigned claims payable under the war risks policy, subject to an excess, to the bank and the Club had consented to that assignment. The war risks policy was not directly at issue here, but the Club Rules applicable to it were a factor in the interpretation of the MIIP.

The facts and events

In August 2015 *ZouZou* was in Puerto de la Cruz in Venezuela to load a cargo of high-sulphur diesel oil ("HSDO") for internal carriage within Venezuela. Upon inspection following completion of loading it was discovered that HSDO had entered the vessel's No 6 cargo tanks, although only tanks Nos 1 and 2 had been nominated for loading in the cargo distribution plan.

On 22 August law enforcement officials apprehended three employees of the sub-charterer PDVSA and four crew members including the master, and detained the vessel. Clyde & Co in Venezuela were instructed by the vessel's P&I Club to represent owners locally. On 27 August the crew members were arraigned on suspicion of smuggling offences. The vessel was made subject to "preventive seizure" on the grounds that it was used as a means to carry out criminal activity and placed under naval guard. A statutory 45-day preliminary investigation period followed, during which the crew members' and vessel's interests were represented by Clyde & Co which actively participated in the investigation and notably made a number of requests for investigative measures to the prosecuting authority. The crew members were charged with smuggling offences on 10 October 2015 and the preventive seizure was continued. The investigative phase against the existing defendants was concluded by the charges, but prosecutors requested the continued detention of the vessel and reserved the possibility of charging further defendants. This could have potentially included the shipowners, in which case the vessel might have been confiscated. There was also the matter of some of Clyde & Co's requests which had not yet been acted upon by prosecutors by the time of the charges.

Calver J concluded that the prosecutors had justifiably considered that the vessel remained essential to the investigation up until the filing of charges. They had requested continued detention; had expressly left the

investigation open; and had been requested by Clyde & Co to undertake a series of further investigative measures.

After the charges and detention order, there followed a period of proceedings, appeals and postponements. The owners unsuccessfully pursued the release of the vessel by appealing the detention order to the Court of Appeal. On 24 May 2016 Clyde & Co filed a third-party motion with the Criminal Control Court seeking the vessel's release and arguing, essentially, that the owners had no involvement in the alleged criminal conduct. However, this did not immediately result in the vessel's release. On 30 June 2016 the owners claimed an indemnity under the war risks policy for the actual total loss of the vessel. The Hellenic Club rejected that claim with reference to the classification of Venezuela as an Additional Premium Area; and also to Rule 3.5 of its Rules: "action taken by any state or public or local authority" under the criminal law, or on the grounds of alleged contravention of the laws of any state. The owners objected to this in that no action had been taken against the owners themselves or against the vessel.

On 14 September 2016 the bank notified the insurers of a potential claim under the MIIP, stating also that it appeared likely that the war risks insurers would decline liability.

On 3 October 2016 the owners tendered notice of abandonment to the Hellenic Club claiming that the vessel was a constructive total loss, without prejudice to their earlier claim for an actual total loss. The Hellenic Club rejected the notice of abandonment but agreed to place the owners in the same position as if a claim form had been issued on that date.

Meanwhile, proceedings regarding the release of the vessel continued. At the end of August 2016 the owners had submitted a brief in furtherance of their third-party motion, seeking to demonstrate that the criteria for the release of the vessel were satisfied. On 17 October 2016 the court granted the third-party motion for the release of the vessel. This was due to the prosecuting authority having changed its position from objecting to it (on 9 September) to accepting it (on 29 September), following the submission on that date of a non-binding opinion by the National Office Against Organised Crime. On 12 November 2016 the vessel was returned to its owners. On 16 November 2016 the owners served a second notice of abandonment on the Hellenic Club, claiming that the vessel was an ATL or a CTL, without prejudice to the earlier claims. This was rejected a week later but the Club agreed to place the owners in the same position as if a claim form had been issued on 16 November. A month later, the bank surmising that owners would not be paid under the war risks policy, it submitted its own claim under the MIIP to the defendants.

On 16 March 2017 the Club avoided the war risks policy for lack of disclosure of the vessel's calls in an Additional Premium Area.

The crew members were acquitted on 30 August 2019.

Policy construction

A first issue was whether there would have been cover under the war risks policy, which turned on the construction of the Club's Rule 3.5. If this exclusion operated, so that the events were not covered under the war risks policy, this would in turn not support recovery under the MIIP. The bank's arguments were therefore to the general effect that the exclusion did *not* apply. The judge was not persuaded by the bank's argument that the detention had not been effected *under* criminal law but *incidental to* criminal law. Nor did the language of the rules suggest that they should be read as only applying when the owners themselves were the accused. The use of the word "owner" did not signify that the owner must *itself* be the accused entity, it was merely descriptive of the insured. In the result, the loss would have fallen within the exclusions in Rules 3.5.1 and 3.5.2 of the Club Rules with the detention order being the proximate cause of the loss of the vessel.

The next issue concerned the lawfulness of the detention. It was common ground that the original detention

order had not been unlawful. The question arose whether the detention had at some stage thereafter *become* unlawful. If so, it was open to the bank to argue that such detention did not fall under the exclusion in Rule 3.5. On the evidence of Venezuelan law and procedure, the judge concluded that there was no duty on the prosecutors or judge to release the vessel at any stage. The onus was instead on the owners to seek release from detention, either by a third-party motion or by petitioning prosecutors to seek release. She went on to hold that if any such duty on prosecutors or court existed, on the facts no breach thereof had been established by the bank. As the insurers had argued, the position in October 2015, at the time of the charges against the crew members, the vessel remained essential to the investigations, as shown by the fact that the prosecutors had stated that the investigations were to continue thereafter. The vessel remained essential to the investigation until the prosecutors withdrew their opposition to the third-party motion on 29 September 2016, after which point it was released by the court. The judge commented with reference to the charging document issued by prosecutors on 9 October 2015: "If the owners considered that the detention of the vessel after that date was unlawful, there was nothing stopping them from making an application to the court … for the [vessel's] release, but they chose not to do so until 24 May 2016" (at para 207).

It is noted that the judge here did not distinguish between the factual situation objectively at hand and the position as presented by the owners in the Venezuela proceedings: while the owners successfully *established* the criteria for release only in September 2016, it appears possible that on the facts, the vessel was no longer essential to the investigation at some point *before* that date.

Upon a close analysis of Venezuelan law and procedure, the judge went on to conclude that the detention of the vessel was not at any stage unlawful and therefore would not have been covered under the war risks policy in any event.

Constructive total loss?

The vessel was not a constructive total loss (CTL) under the war risks policy. The MIIP was subject to the Marine Insurance Act 1906 and the CTL fell to be assessed under section 60. It was for the bank to show that as at the operative date, namely 3 October 2016, the date when the Club had agreed to place the owners in the same position as if a claim form had been issued, it was "unlikely" that the vessel could be recovered within a reasonable time. However, the judge took the view that as of that date, it was instead likely that the vessel would be released. Prosecutors had by this time consented to release, which made it likely that the court would order it. Release was in fact ordered on 17 October.

In the result, the bank had no claim under the war risks policy (as assignee); both because the loss was excluded by Rule 3.5 and because they could not establish a CTL on the facts.

Mortgagees' interest policy

The question remained if there was any scope for recovery under the MIIP which exceeded and did not depend on shortfalls in the cover under the war risks policy. The bank had argued that there was such scope, but did not succeed.

The coverage clause is too extensive to set out here, but may be seen at para 229 of the judgment. The ingress reads: "This insurance to indemnify the Insured for loss of, or damage to, or liability arising in connection with the vessel …", and some of the six sub-clauses that follow make explicit mention of owners, while others do not.

The judge broadly interpreted the policies as being back-to-back in the manner of reinsurance. The bank had argued that some of the coverage was independent, and indeed parts of the insuring clause made no reference to the owners' policy; but the judge could not be dissuaded from a purposive construction: the MIIP was to protect the bank against the risk of non-payment under the owners' policy. The judge relied on the "Interest"

clause which defined the bank's interest as that not of mortgagee but of assignee and loss payee in the event of an occurrence that would have been treated as a loss between owners and insurers. The interest was defined as "Mortgagee and/or Lessors and/or Innocent Owners Interest *as Assignees and Loss Payees under the owners Policies* ..." (emphasis added). The MIIP was entirely subject to the owners' policy.

Comments

It is difficult to evaluate the position under Venezuelan law as to the lawfulness of the detention, but the judge's discussion is logical and sound. Equally, the outcome under the war risks policy seems unassailable. However, the consideration of the MIIP prompts some reflections. It may be observed that while subsidiarity to the owner's policy may well be the general construction of an MIIP, there seems to be no particular or technical reason why an individual MIIP could not also include some elements of cover going beyond the narrow risk of the owners. Recovery in excess of or in addition to that under owners' cover was termed "uncommercial and contrary to the purpose of MII cover" (at para 254) – but cover "in addition" is precisely the purpose (eg where owners' conduct causes a lack of recovery). Far from being uncommercial, it seems commercially entirely sensible to acquire cover of a wider scope. The wording of the policy may therefore be a better lodestar than the purpose of the policy in this regard.

Double recovery is curtailed to the extent required by the principle of indemnity or insurable interest as the case may be. In the present case, the judge adopted insurers' statement of the bank's interest namely as "assignees and loss payees" under the owners' war risks policy. That narrow definition justifies limited recovery. If the interest had been the bank's potentially wider interest as mortgagee (not an unrealistic proposition under a "mortgagees' interest policy"), a wider recovery would be permitted based on the parties' wording and irrespective of any identified generalised purpose of the type of policy.

The case raises the more general question of contract sub-types and how fixed they are. Once it has been determined that a policy is a mortgagees' interest policy, does that determine the policy scope, or is it still necessary to read the policy terms carefully to determine the scope of cover? How carefully? How much direction should the reader take from the header and commercial context, and how much from the insuring clause and exclusions? On the face of it, English law would seem to provide that only the terms are relevant – if so, did the judge leap too quickly in dismissing cover beyond the scope of the mortgagee's interest? The answers to these questions have implications for other commonly categorised contracts, not least charterparties which may be categorised as voyage, time and bareboat charters and where intermediate forms are said to exist (and in practice certainly do) but are rarely offered any real acknowledgment in law.

Permission to appeal was refused by the Court of Appeal on 15 August 2022. The appeal from a decision on 9 June in the same case remains pending (as of 26 August 2022).

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